

1. Claimant filed an Application for Hearing on August 9, 2006 alleging an injury to her back beginning on or about September of 2000 and continuing each day worked through current employment. Claimant last worked on August 29, 2006 when her family physician took her off work.
2. Claimant notified her employer about her back injury. Claimant's immediate supervisor in September of 2000 denies receiving notice of a back injury. However, Donald Leidheiser, claimant's Human Resource Manager, admits to having several

discussions with claimant about her alleged back injury and whether it should be filed as a workers compensation injury or a personal injury condition eligible for short term disability.

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6. Claimant returned to work after [back] surgery with restrictions. She returned to Dr. Lewonowski in March of 2006. She developed additional problems with her back in May of 2006. Claimant relates the additional problems to her work activities and reported her increased problems to her supervisor, John Keys.

7. Claimant's duties were changed, but as she continued to work, her back became worse.

8. Claimant was involved in an altercation on August 24, 2006 with her two teenage children who were fifteen and sixteen years old. Her daughter shoved claimant and she fell on the coffee table and floor. When she got up, her son shoved her around as well. Claimant called the police and made a police report.

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10. Claimant reported to Dr. Gonzale[z] a few days later on August 29, 2006 with low back pain and he recorded that claimant was starting to have some radicular symptoms in her left leg. Claimant further advised Dr. Gonzale[z] that the pain started up after the altercation with her children last week and the pain was similar to the pain she experienced prior to the fusion of her lumbar spine in 2001. In his office notes dated August 29, 2006, Dr. Gonzale[z] diagnosed "degenerative disk disease of the lumbar spine, patient now with exacerbation of symptoms." Dr. Gonzale[z] took claimant off work effective August 29, 2006.

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12. Claimant is requesting authorized medical treatment for her back, payment of outstanding medical bills, reimbursement of prescription costs and temporary total disability beginning August 29, 2006 and continuing until she returns to gainful employment.

13. Based on the above findings, the court concludes that claimant has established that it is more probably true than not true, that she was injured while working for respondent and that her injury arose out of and in the course of her employment.

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15. Notice and written claim were timely made.

16. Claimant sustained an intervening accidental injury when she was injured on August 24, 2006 in an altercation with her children.

17. Claimant is entitled to authorized medical treatment, payment of outstanding medical bills and reimbursement of prescription costs regarding her back injury beginning in September of 2000 and continuing until August 24, 2006 when she sustained a new injury. Specifically, respondent is not liable for any medical bills beginning August 24, 2006.

Claimant requested a second preliminary hearing, which was held on June 21, 2007. The only issue addressed at that hearing was whether the August 2006 intervening injury was merely temporary in nature or, in other words, whether the intervening incident should bar claimant's request for preliminary hearing benefits. Following the June 21, 2007, hearing, the Judge requested Dr. Paul S. Stein to perform an independent medical evaluation and address that issue. After receiving the doctor's report, the Judge issued the August 28, 2007, Order, which reads in pertinent part:

After considering the medical exhibits, testimony presented and remarks of counsel, the court took the matter under advisement and ordered an Independent Medical Examination with Dr. Paul Stein.

The court has now received and reviewed the report of the independent medical examination as well as the comments of counsel. This decision follows:

1. In an Order issued May 3, 2007, this Court found that claimant sustained personal injury by accident arising out of and in the course of her employment on or about September of 2000 and continuing each day worked through current employment.
2. The court further found that claimant sustained an intervening accidental injury when she was injured on August 24, 2006 in an altercation with her children.
3. During the preliminary hearing on June 21, 2007, claimant presented evidence from Dr. Kris Lewonowski who opined that the altercation of August 24, 2006 was a temporary exacerbation of her pre-existing condition, and that claimant's need for surgery was due to her work activities which occurred before the altercation.
4. The court ordered Dr. Paul Stein to perform an IME and offer his opinion.
5. The court has reviewed the independent medical examination report and the other evidence submitted in this case. After reviewing the evidence, the court finds that the altercation with her children on August 24, 2006 was a temporary exacerbation of claimant's pre-existing work related back condition.

The Judge then ruled claimant was entitled to receive medical care, payment of outstanding and related medical expenses, reimbursement of prescription drug expense, and temporary total disability benefits.

Respondent and its insurance carrier contend Judge Barnes erred. Respondent and its insurance carrier first argue claimant has failed to prove her back injury arose out of and in the course of her employment with respondent. Next, they argue equitable estoppel precludes claimant from now claiming workers compensation benefits as she initially applied for, and received, short-term disability benefits after representing her back injury did not occur at work. Finally, respondent and its insurance carrier argue claimant's request for benefits should be denied as she has failed to prove she submitted timely written claim. In that respect, they argue the date of accident in this claim is governed by K.S.A. 44-508(d), which would allegedly create a date of accident of November 21, 2001, and that claimant did not submit written claim until August 2006. In short, respondent and its insurance carrier contend the August 28, 2007, Order must be reversed.

Conversely, claimant argues the August 28, 2007, Order should be affirmed.

As indicated below, the only issue before the Board on this appeal is whether claimant sustained an intervening accident that now precludes her from receiving workers compensation benefits for her present back condition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

In addition to the issue stated above, respondent and its insurance carrier also attempt to raise the following issues on this appeal: whether claimant injured her back in an accident that arose out of and in the course of her employment with respondent; whether claimant provided respondent with timely written claim; and whether equitable estoppel precludes claimant from receiving workers compensation benefits. Those issues were addressed in the Judge's May 3, 2007, Order, which was not appealed. More importantly, those issues were neither raised at the June 21, 2007, preliminary hearing nor addressed in the August 28, 2007, Order, which is the subject of this appeal.

As stated in the August 28, 2007, Order, the issue presented for adjudication at the June 21, 2007, preliminary hearing was whether claimant's August 2006 altercation with her children was merely a temporary exacerbation of her symptoms. At that preliminary hearing, the parties did not present evidence regarding those other issues that respondent and its insurance carrier now attempt to raise on this appeal.

The Board's jurisdiction is limited to those questions of law and fact presented to the administrative law judges.¹ Accordingly, at this juncture the Board is without jurisdiction to address those issues that were not raised at the June 21, 2007, preliminary hearing. Consequently, as to those issues this appeal should be dismissed.

Based upon the above, the sole issue on this appeal is whether claimant sustained an intervening injury that now precludes her from receiving workers compensation benefits for her present back condition. Judge Barnes found the altercation between claimant and her children on August 24, 2006, comprised a temporary exacerbation of claimant's back condition. And this Board Member agrees.

At the June 21, 2007, preliminary hearing claimant presented the May 23, 2007, report from Dr. Kris Lewonowski, who had seen claimant in the months before the altercation occurred. According to Dr. Lewonowski, claimant needed back surgery as early as March 2006. Moreover, an MRI taken after the altercation did not show any significant change to claimant's spine. The doctor wrote:

I am in receipt of your letter dated May 11, 2007 in which you asked was Ms. Diaz already in need of additional surgery to repair her back because of her work activities before an altercation, which occurred on August 24, 2006 and my answer is [an] emphatic yes. Ms. Diaz was seen in my office on March 28, 2006, prior to that she has been seen in January of that year. She has had two epidural injections since she was previously seen in January, but stated that they are really not helping. At that time, she continued with low back pain with left greater than right lower extremity pain and had an MRI, which reveals significant junctional stenosis and degenerative disc disease at L3-L4 and basically had collapse of the disc at that time, although the patient wished to stay with nonoperative conservative treatment as long as possible, this ultimately failed and that was my prediction in March. The interesting thing is we have copies of x-rays taken after her previous surgery years before, which revealed an excellent disc space height at L3-L4, typical degenerative time above fusion is much longer 10 to 15 years in the average case and this occurs only in 10 to 15% of patients. In her case, the patient had very rapid junctional degeneration and ultimately developed stenosis. Her problem usually [is] reserve[d] for the patients in their 60s, 70s, and 80s. At that time, I was recommending surgery, she was 46 years old. However as I mentioned, she want[ed] to stay conservative, I was able to do so, but for only a brief period of time. I believe the result of her altercation on August 21 [sic], 2006 was a temporary exacerbation of her lower back problems. You go on to note that the altercation as described by Dr. Gonzalez resulted in increasing back pain and radicular symptoms in her left leg and you also noted MRI performed on August 30, 2006. The different MRIs between August and March do not show significant change in her condition

¹ K.S.A. 2006 Supp. 44-555c(a).

in my opinion. As you know, she had already had an MRI preformed [sic] on August 28, 2006, it is that very MRI which I used to make my diagnosis of junctional stenosis in this patient. Dr. Gonzalez did repeat her study and this really shows no interval change. I believe that the altercation merely served as a temporary exacerbation of her preexisting condition. I hope this letter serves to answer your needs. Basically what I am saying is that he asked if these different MRIs show a significant change in her condition in my opinion. My opinion is that they do not. The altercation only served as a temporary exacerbation. I thought she needed surgery way back in March, but she wanted to stay conservative.²

Also, Dr. Paul S. Stein, who examined claimant in late July 2007 at Judge Barnes' request, concluded in his medical report that he forwarded to the Judge that he did not believe the August 2006 altercation was a major factor. According to Dr. Stein, the incident may have increased claimant's pain but it did not appear to have altered the spine.

In short, respondent and its insurance carrier have failed to prove claimant has sustained an intervening injury that would preclude claimant from receiving workers compensation benefits.

[W]here respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.³

Conversely, the evidence at this stage of the proceeding indicates claimant's need for medical treatment arises from the work-related injury as determined by the Judge. Consequently, the August 28, 2007, Order should be affirmed.

The Workers Compensation Act provides that preliminary hearing findings are not final. Instead, preliminary hearing findings may be addressed "in a full hearing on the claim."⁴ Moreover, the Act provides a mechanism for an employer and its insurance carrier to recover excess compensation that has been paid or provided.⁵

² P.H. Trans. (June 21, 2007), Cl. Ex. 1.

³ *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), cf. *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

⁴ K.S.A. 44-534a(a)(2).

⁵ See K.S.A. 44-534a(b).

This review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the August 28, 2007, Order entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of December, 2007.

KENTON D. WIRTH
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge